IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1938.

No. 21.

WM. H. NEBLETT, et al.,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR.,

Respondents.

Brief on Behalf of Respondents, Hall and McManus, Intervenors for Themselves and All Other Holders of Non-cancellable Income Policies of the Pacific Mutual Life Insurance Company of California.

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SUBJECT INDEX.

TABLE OF AUTHORITIES CITED.

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Preliminary Statement.

On or about August 5, 1936, by an order duly made pursuant to section 382 of the California Code of Civil Procedure, the court of first instance, upon the petition of respondents Hall and McManus, holders of non-cancellable income policies, ordered that they be and they were given leave to intervene in the original proceeding on behalf of themselves and of all holders of non-cancel-

lable income policies issued by the old company. Their answers are set forth at pages 773-782 and pages 914-989 of the printed record.

The writer was retained as their attorney and bore a laboring oar on the trial in the court of first instance and these respondents adopted as their proposal the "Giannini" Plan, so-called, and strongly urged its adoption. It furnished about $12,000,000 of new money but was rejected by the commissioner in favor of his own plan.

These respondents beg leave to join in the brief of the respondent George I. Cochran, but desire to add a brief memorandum.

I.

The commissioner urges that under the Insurance Code he is made trustee for all classes of policyholders and that he, with the court's approval, had the right under the same statute to himself determine what these conflicting interests should receive upon the reorganization. A trustee for opposing interests is in a difficult situation.

The court below evidently agreed with his contention and said that the constitutional rights of policyholders otherwise inviolable must bow to the reasonable exercise of the state's police power.[1]

It is submitted that the public is not at all concerned in the question of whether a life policyholder who provides

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[1] *Carpenter v. The Pacific Mutual Life Ins. Co.*, 94 Cal. Dec. 681 at page 696.

for his family in the event of his death or a non-can policyholder who provides for his family in the event of his disability comes off best in the reorganization of a life insurance company; this is a purely private affair between individual litigants whether those litigants are two in number or fifty thousand.

It is no longer necessary to burn a house down to roast a pig. In lieu of the elaborate machinery of a section 77b, there is substituted the simple expedient of vesting in an administrative officer the right to make a rehabilitation agreement with himself, not subject to the court's control and direction, but its bare right to approve or disapprove the agreement as made.

But the court below urges (page 700) that an estoppel arises as to those who assent to the agreement and those who dissent may file claims. The test of reasonableness and of discrimination in a reorganization would thus be excluded.

Thus is the ancient control of a Court of Equity over a reorganization dispensed with, and the rights of security holders made dependent on the ukase of an administrative officer. No right to reorganize is vouchsafed by the statute either to the shareholders or the policyholders, nor are the consents of any of them required.

II.

The Reorganization Agreement Places the Entire Risk of Future Loss on the Non-Can Policyholders.

By walling off the share of the assets applicable to life insurance reserves, the $3,000,000.00 of capital and surplus of the new company, placed at the hazard of the future, is taken entirely out of the reserves otherwise applicable to the non-can policies. In the event of future insolvency the loss would fall entirely upon the non-can policyholders.[2]

III.

The Court Should Preserve the Reorganized Corporation but Order the Creation of a Horizontal Lien to Equalize the Loss.

Confusion and loss would result from completely upsetting the reorganization, especially in view of the new business it has undertaken.

The court is contemplating a *fait accompli*. It is submitted that the best result could be obtained by placing a horizontal lien upon all old policies to equalize the loss sustained.

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[2]*Cf. Central Pennsylvania Nat'l Bank v. N. J. Fidelity Plate Glass Co.* (N. J.) 177 Atl. 441. *Benjamin v. Mutual Life* (1905) 146 Cal. at p. 34.

Conclusion.

It is respectfully submitted that the decree below be modified to the extent suggested.

Respectfully submitted,

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Counsel for Respondents Above Named.